

STATE OF MICHIGAN
COURT OF APPEALS

BLUE LAKE FINE ARTS CAMP,

Plaintiff-Appellant,

v

BLUE LAKE TOWNSHIP ZONING BOARD OF
APPEALS, THE FORREST J. HARRIS TRUST,
and WAYNE HARRIS,

Defendants-Appellees.

UNPUBLISHED

March 22, 2007

No. 265782

Muskegon Circuit Court

LC No. 03-042243-AV

Before: O’Connell, P.J., and Murray and Davis, JJ.

PER CURIAM.

Plaintiff Blue Lake Fine Arts Camp appeals by leave granted the trial court’s order affirming defendant Blue Lake Township Zoning Board of Appeals’ decision to grant non-use variances to defendants Wayne Harris and the Forrest J. Harris Trust. The variances would allow Wayne Harris and the Trust to construct single-family homes on certain parcels of land. We reverse and remand to the Zoning Board of Appeals.

Two months before defendants Harris and the Trust applied for the non-use variances at issue, the Township amended its zoning ordinance to create four Forest Recreation-Residential zoning districts and a single Forest Recreation-Institutional zoning district. Section 3.6 of the zoning ordinance provides that no dwellings shall be erected in non-residential districts, including the Forest-Institutional zoning district. However, because the amendments were so recent at the time the variance proceedings before defendant Zoning Board of Appeals, the parties proceeded under the misconception that all of the parcels at issue were zoned Forest-Residential. Therefore, the landowners inappropriately applied for dimensional, or non-use, variances, to build homes on their undersized property, when, in fact, they needed use variances because the use desired was not permitted in the zone. See *Nat’l Boatland, Inc v Farmington Hills Zoning Bd of Appeals*, 146 Mich App 380, 387; 380 NW2d 472 (1985). Even though the type of application was improper, the ZBA granted the inapplicable non-use variances, and the trial court later found that the ZBA would have granted use variances to the landowners anyway, so review of the errant decision was moot.

Plaintiff first argues that the trial court erred by affirming the ZBA’s non-use variance when a use variance was necessary. We agree. “The decision of a zoning board should be affirmed by the courts unless it is (1) contrary to law, (2) based on improper procedure, (3) not

supported by competent, material, and substantial evidence on the record, or (4) an abuse of discretion.” *Reenders v Parker*, 217 Mich App 373, 378; 551 NW2d 474 (1996). Under the unusual circumstances in this case, the trial court found that the zoning board failed in several respects to establish a sufficient factual record. The trial court also found that the ZBA misapplied the law because it was operating under the mistaken impression that the anticipated structures were allowed in the zone. In reality, residential structures were not merely limited by the size of lot, but instead were entirely disallowed in the newly amended zone. Nevertheless, the trial court affirmed the ZBA’s actions on the basis of a series of presumptions. It first held that the ZBA had the discretion to modify the zoning ordinance’s requirements to avoid injustice, so it did not need to comply with the ordinance’s procedural requirements before granting the use variances. It then held that the loss of the properties’ value alone would have justified the ZBA’s actions. The trial court relied extensively on MCL 125.293, which provides, “Where there are practical difficulties or unnecessary hardship in the way of carrying out the strict letter of the zoning ordinance, the board of appeals in passing upon appeals may vary or modify any of its rules or provisions so that the spirit of the ordinance is observed, public safety secured, and substantial justice done.”

However, the trial court did not remand the case to the ZBA to revisit the “spirit” of the new ordinance, but instead determined that the ZBA would have made the requisite finding of unnecessary hardship on remand. The trial court principally relied on the ZBA’s finding that the parcels were of little value to the landowners unless the landowners could build residences on them. The trial court correctly cited *Ervin Acceptance Co v Ann Arbor*, 322 Mich 404, 411; 34 NW2d 11 (1948), for the proposition that a zoning ordinance is unreasonable and confiscatory as applied to specific property where most of the value of the property is destroyed by application of the ordinance. However, the trial court did not make this finding independently and instead relied on the ZBA’s scant conclusions to support the proposition.

In the end, the trial court’s approach confused the constitutional issue of confiscatory zoning, which is a constitutional issue that should be resolved by a trial court, see *Sun Communities v Leroy Twp*, 241 Mich App 665, 672; 617 NW2d 42 (2000), with a variance decision, which a ZBA should resolve only after developing a sufficient record and conforming to its own zoning ordinance restrictions. *Reenders, supra*. The ZBA was not at liberty to rewrite the zoning ordinance in favor of its own policy findings. *Farah v Sachs*, 10 Mich App 198, 206; 157 NW2d 9 (1968). Under the circumstances, the trial court erred by speculating about what the ZBA would have done if it had applied the appropriate law and made the correct factual findings. It also erred by relying on the ZBA’s conclusory findings of lost value to assume that the ZBA would have made a far-reaching decision regarding the unconstitutionality of the new ordinance. A township’s ZBA does not have power to legislate and “may not in the guise of a variance amend the zoning ordinance or disregard its provisions.” *Id.* In short, the record does not adequately support the learned trial court’s assumptions, and we must reverse its decision. On remand, the ZBA should apply its zoning ordinance and make the relevant factual findings that will lead it to a just result.¹

¹ Judge O’Connell agrees with the concurring opinion.

Reversed and remanded to the Blue Lake Township Zoning Board of Appeals for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Peter D. O'Connell

/s/ Alton T. Davis